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NO. 80-180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

W. C. McDANIEL, ET AL.,
Petitioners

v.

JOSE SANCHEZ, ET AL.,
Respondents

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in holding that a proposed reapportionment plan, submitted by a local legislative body in response to an invalidation of a prior plan, does not lose its status as a legislative rather than court-ordered plan for purposes of the preclearance provisions of the Voting Rights Act, 42 U.S.C. 1973(c) merely because it is the product of litigation conducted in a federal forum?

2. Did the Court of Appeals err in holding that a new reapportionment plan enacted by a state, including one purportedly adopted in response to the invalidation of the prior plan by a federal court, will not be considered effective as law until it has been submitted and has received clearance pursuant to the preclearance provisions of the Voting Rights Act, 42 U.S.C. 1973(c)?

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Pursuant to Rule 34.2 of the Supreme Court, the plaintiffs,* while not concurring totally with the defendants' characterization of the facts, will not restate the case

* The parties will henceforth be referred to as they were in the trial court: the petitioners-county officials were defendants and respondents were plaintiffs. References to "defendants" in this brief refer to the County Judge and the four County Commissioners rather than the County Clerk and Sheriff.

beyond correcting the following inaccuracies and omissions:

Testimony from the December 10, 1979 hearing on the plan revealed that the defendants, in fulfillment of their legislative duty to reapportion, decided to employ a statistician, Robert Nash, Ph.D., to assist them in the drafting of a new redistricting plan, (J.A. 14, 24, 25). After hiring Dr. Nash, the defendants gave him instructions on how to draft the redistricting plan, which he followed, (J.A. 25, 27, 28). After at least three meetings with the defendants, in foth formal Commissioners Court meetings and informal meetings, Dr. Nash completed the plan, (J.A. 25, 26, 27). He then presented the plan to the Commissioners Court at a formal meeting called in the ordinary course of that legislative body's business. After explaining the plan to the defendants, Dr. Nash was asked by the defendants to make a correction, which he did, (J.A. 28, 35). The defendants then officially adopted the plan at a formal meeting as the plan they would submit to the district court, (J.A. 40), and the plan they would officially adopt if the district court permitted them to do so, (J.A. 40). When asked why the Commissioners Court did not consider either of plaintiffs' plans, the County Judge stated the Commissioners Court would rather "redistrict ourselves" if given the opportunity by the district court, (J.A. 41, 42).

On January 14, 1980, the district court entered an order stating it "approved" the defendants' plan without modification (District Court's order of January 10, 1980; Petition for Certiorari, Appendix, p. A-23). The district court found the plan satisfied the principle of one-person, one-vote but made no finding in relation to the dilution

of minority voting rights and at the same time found Section 5 preclearance was unnecessary. (District Court's Order of January 10, 1980; Petition for Certiorari, Appendix, p. A-22, 23).

SUMMARY OF THE ARGUMENT

Under the federal common law of remedies applicable to reapportionment cases, the defendants' redistricting plan should be considered a "legislative plan" rather than a "court-ordered plan." *Burns v. Richardson,* 384 U.S. 73 (1966); *Wise v. Lipscomb,* 437 U.S. 535 (1978); *Connor v. Waller,* 421 U.S 656 (1975); *U.S. v. Board of Supervisors, Warren County, Miss.,* 429 U.S. 642 (1977); and *Morris v. Gressette,* 432 U.S. 49 (1977). Under Article 5, Section 18 of the Texas Constitution, the defendants had authority to redistrict the county commissioners precincts when they submitted their plan to the district court and received the court's approval. *East Carroll* should be read as turning on its own peculiar facts. This Court should adhere to its ruling in *Board of Supervisors, Warren Co., Miss.*

Federal common law precedent aside, a political subdivision's legislative authority should not become a factor in deciding whether or not a plan is "legislative" or "court-ordered" for the purpose of Section 5 preclearance; when a political subdivision proposes a reapportionment plan to the court, that act alone should trigger Section 5 coverage because the political subdivision is seeking to administer a voting change by having the court incorporate the subdivision's plan in its order. To rule otherwise would be contrary to the legislative history of the Voting Rights Act and would permit a judicially created

exception to become a vehicle for the circumvention of the Act. Other undesirable results that would be caused by the adoption of such an exception to the Section 5 preclearance requirement would include: increased litigation and exhaustion of judicial resources, the compromise of state legislative policy choices when state plans fail to meet the higher standards of review for judicial plans, and the entanglement of the federal judiciary in the process of state reapportionment.

ARGUMENT

1. THE FEDERAL COMMON LAW OF REMEDIES APPLICABLE TO REAPPORTIONMENT PLANS DICTATES THAT THE COUNTY'S PLAN BE CATEGORIZED AS "LEGISLATIVE" RATHER THAN "COURT-ORDERED" AND SUBJECT TO THE SECTION 5 PRECLEARANCE REQUIREMENT

The Kleberg County defendants argue that the apportionment plan adopted by the county and "approved"[1] by the district court is "court-ordered" rather than "legislative", and therefore not subject to Section 5 review. They cite *East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976) as controlling and argue that other authorities support their contention, e.g. *Connor v. Johnson,* 402 U.S. 690 (1971); *Morris v. Gressette,* 432 U.S. 491 (1977); *Connor v. Waller,* 421 U.S. 656 (1975); and *Wise v. Lipscomb,* 437 U.S. 535 (1978). In the arguments to follow, plaintiffs will show why the defend-

1. District Court's Order of October 2, 1979; Petition for Certiorari, Appendix, p. A-23.

ants' reliance on these cases is misplaced, and in fact, why these decisions in reality support the plaintiffs' contention that the subject plan is a creature of legislative fiat which must first be reviewed by the District Court for the District of Columbia or the Attorney General prior to its implementation.

The Court first addressed the issue raised by this appeal in *Connor v. Johnson*, 402 U.S. 690 (1971), on application for an emergency stay of a multi-member legislative apportionment plan formulated by a three-judge district court. The applicants for the stay, plaintiffs in the litigation below, asked that the filing deadline be extended, and that the lower court be required to fashion a single-member district plan, or, in the alternative, submit the court's own plan to the Attorney General or the District Court for the District of Columbia for Section 5 review. The *per curiam* opinion dismissed the latter request with the observation that, "[A] decree of the United States District Court is not within the reach of Section 5 of the Voting Rights Act of 1965." 402 U.S. at 691. That brief reference in *Connor* has been greatly qualified in subsequent decisions of this Court, particularly in cases such as this litigation where (1) the district court played no active role in formulating the apportionment scheme, and (2) exigent circumstances caused by the time pressures of an imminent election are absent. Indeed, the district court in the present litigation did not even enter its order declaring the existing plan unconstitutional until one year after the case was submitted for decision.

Defendants next argue that the instant case is controlled by dicta in a footnote in this Court's *per curiam* opinion in *East Carroll Parish School Board v. Marshall*, 424

U.S. 636 (1976).[2] The county argues, that like the Board and Jury in *East Carroll,* the defendants did not have legal authority to enact the plan presented to the district court. In support of their disavowal of authority, defendants cite Article 2.04(1) of the Texas Election Code and *Wilson v. Weller,* 214 S.W.2d 473 (Tex. Civ. App. 1948, no writ). Plaintiffs disagree with defendants' reading of *East Carroll,* as well as their interpretation of state law.

In *East Carroll* the district court, *sua sponte* and as part of its continuing jurisdiction over a previous malapportionment action involving the Jury and the Board, requested that the Jury and Board submit a new apportionment plan, as the 1970 census had just been published. The Jury and the Board resubmitted their existing at-large plan which was originally implemented through a consent decree in previous litigation, *Marshall v. Edwards,* 582 F.2d 927, 929 (5th Cir. 1978), *cert. den.* 442 U.S. 909 (1979). Stewart Marshall was permitted to intervene as a party plaintiff. Marshall challenged the validity of the at-large plan on the grounds that it violated 1) the Fourteenth and Fifteenth Amendments and 2) the Voting Rights Act of 1965 since the Attorney General had interposed an objection to the Louisiana law enabling the creation of at-large juries and parishes. The district

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2. Defendants rely on *East Carroll* as controlling the outcome of the instant case. (Pet. Br. 11, 15, 16) If, as plaintiffs suggest in their discussion of *U.S. v. Board of Supervisors, Warren Co., Miss.,* 429 U.S. 642 (1977), *post East Carroll* has been restricted to its own peculiar facts by *Board of Supervisors, Warren Co., Miss.,* then defendants' arguments would fail if they are unable to demonstrate that the facts of the instant case are substantially identical to *East Carroll.* See also, *Wise v. Lipscomb,* 437 U.S. at 549, Justice Powell, concurring in part and concurring in the judgment, reading *East Carroll* as turning on its own peculiar facts because the brief *per curiam* opinion failed to mention *Burns v. Richardson,* 384 U.S. 73 (1966).

court approved the Jury's plan after finding it to be constitutional. Marshall appealed it. A panel of the court of appeals affirmed the district court's decision and held that the Voting Rights Act did not apply. *Zimmer v. McKeithen,* 467 F.2d 1381 (5th Cir. 1973).

On rehearing en banc the full court of appeals disagreed with the panel and reversed the district court. *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973) (en banc). Judge Gewin wrote the opinion for the closely divided court, which held that the at-large system unconstitutionally diluted the votes of Blacks. Because the court of appeals resolved Marshall's challenges on constitutional grounds, the opinion did not directly address the issue of Section 5 of the Voting Rights Act.

The Supreme Court affirmed, *sub nom., East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976). In a unanimous *per curiam* opinion, it was held that the district court had abused its discretion in not ordering a single-member reapportionment plan since no special circumstances dictated the use of multi-member districts. The Court observed, in a footnote response to a suggestion in the Government's amicus brief, that the preclearance procedures of Section 5 of the Voting Rights Act were not applicable to the Jury's plan:[3]

> In any event, we agree with the Court of Appeals, *Zimmer v. McKeithen,* 467 F.2d, at 1302 n.9, that court-ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5. Had the East Carroll police jury reappor-

3. Concerning this footnote Mr. Chief Justice Burger said, "[T]he scope of § 5 of the Voting Rights Act is an important matter and I would not undertake to express any view on what the Court discusses by way of dicta in n. 6." 424 U.S. at 640.

> tioned itself on its own authority, clearance under § 5 of the Voting Rights Act would clearly have been required. *Connor v. Waller,* 421 U.S. 656 (1975). However, in submitting the plan to the District Court, the jury did not purport to reapportion itself in accordance with the 1968 enabling legislation, see n.2, supra and statutes cited therein, which permitted police juries and school boards to adopt at-large elections . . . App. 56. Moreover, since the Louisiana enabling legislation was opposed by the Attorney General of the United States under § 5 of the Voting Rights Act, the jury did not have the authority to reapportion itself. See n.2, supra; . . . . Since the reapportionment scheme was submitted and adopted pursuant to court order, the preclearance procedures of § 5 do not apply. *Connor v. Johnson,* 402 U.S. 690, 691, (1971).

424 U.S. at 638-639, n.6.

Again, the Court addressed the preclearance issue without the benefit of full briefing and argument by the parties, and in a context decidedly different from the case at bar. First, the plan in *East Carroll* that was submitted to the Court was not one devised by the legislative body, but rather the resubmission of a plan contained in a judicially approved consent decree from 1968. In contrast, the Kleberg County plan was formulated by the defendants without any input from the plaintiffs, or, for that matter, the district court. Another factor that distinguishes the instant case from *East Carroll* is that the Jury lacked the authority to reapportion itself, because the Louisiana at-large enabling legislation had been opposed by the Attorney General under Section 5, and was therefore void. Kleberg County, on the other hand, was not precluded by either state or federal law from enacting an apportionment plan.

Defendants argue that Article 2.04(1) of the Texas Election Code, as construed in *Wilson v. Weller,* 214 S.W.2d 473 (Tex. Civ. App. 1948, no writ hist.), prevents the defendants from redistricting in any month other than July or August, and that the defendants were without state authority to adopt a plan in December. (Pet. Br. 16) First, it should be observed that the defendants never raised this "lack of authority" argument until their petition for rehearing with the Fifth Circuit. Since neither the district court not the court of appeals addressed this issue, there will be no findings below to guide this Court.[4] The sole issue addressed by both lower courts was whether or not the instant plan lost its legislative status merely because it was submitted in response to a court order invalidating the existing plan. Since the defendants have, at the eleventh hour, raised this as a significant issue, plaintiffs will address it without waiving their objection to its untimely creation.

To understand the defendants' authority to redistrict it is necessary to distinguish "commissioners court precincts"

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4. Although the district court did not address the issue of the authority of the defendants to act under state law, a comparison of the instant case to another case decided by the same district court indicates the court would have found that the defendants had legislative authority. In *Jim Wells Co. Women's Political Caucus v. Jim Wells County, Texas,* (Civil No. 73-C-125, S. D. Tex., 1973), the court found the county malapportioned, accepted the county redistricting plan, and ordered it into effect. The redistricting plan included a redistricting of the commissioners court precincts as well as election precincts, unlike the instant case where there is only a redistricting of the commissioners court precincts. The Jim Wells plan was presented on January 18, 1974. At a later Section 5 coverage hearing, the same district judge, sitting in a three-judge district court, ruled that the 1974 Jim Wells County reapportionment plan was a "court-approved plan . . . and must be submitted to the Department of Justice for preclearance pursuant to Section 5 of the Voting Rights Act." *Arriola v. Harville* (Civil No. C-78-87, S.D. Tex. October 9, 1979, p. 5).

or "county precincts" from "election precincts" or "voting precincts". "Commissioners court precincts" are created by the Texas Constitution, Article 5, Section 18. "Election precincts" or "voting precincts" are created by an act of the Legislature, Texas Election Code, Article 2.04(1). "Commissioners court precincts" are political subdivisions defining the jurisdiction of county commissioners, justices of the peace, and constables. *Tex. Const.*, Art. 5, § 18. On the other hand, "election precincts" are merely geographical areas defining the polling places for the registered voters who are residents of the precincts. *Tex. Elect. Code,* Art. 2.04(1).[5] Election precincts are not representative districts, *Anderson v. Crow,* 260 S.W.2d 227, 233 (Tex. Civ. App. 1953, writ ref'd.), and are not required by law to be redistricted when commissioners court precincts are redistricted. *Tex. Const.*, Art. 5 § 18.

The authority of the defendants to redistrict the county in December or at any other time of year is found in the Texas Constitution, which states, "Each organized county in the State . . . shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight." *Tex. Const.* Art. 5, § 18. The Texas Supreme Court has interpreted the state constitution quite broadly, saying: "When the commissioners' court was organized, in pursuance of the Constitution and the laws passed thereunder, it possessed all powers conferred by both. When the court was once established, no legislation was needed to enable it to exercise the

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5. The purpose served by the time restrictions of Art. 2.04(1), *Tex. Elect. Code,* is to prevent confusion among voters as to where they should go to vote and to insure that voter registration lists and cards will be ready prior to the eve of the election, *Wilson, supra,* 214 S.W.2d at 474 (1948) (referring to the "payment of poll taxes and the certifying of poll lists").

powers given by the above provision, to divide the county into precincts. The direction is plain and simple, and without condition or restriction, except that as to the number of precincts." *Williams v. Castleman,* 247 S.W. 263, 266 (Tex. 1922). The highest Texas court further said, "As to the time of making the division it is equally plain. The language 'from time to time, for the convenience of the people', clearly means that the convenience of the people, as judged by the Court, shall control in determining the time when division is proper. The phrase, 'from time to time' repels the idea that it was the purpose to fix any particular time." *Ibid.* 247 S.W. at 267.

Defendants suggest that Art. 2.04(1), *Tex. Elect. Code,* which prohibits the redivision of election precincts at any term of the commissioners court other than a July or August term, is a bar to their authority to redistrict commissioners precincts in December. But defendants are confusing election precincts with commissioners precincts, and ignoring the plain words of *Castleman, supra.* The statutory time restrictions on the division of election precincts could not, and does not, restrict the redistricting of commissioners precincts under the authority of Art. 5, § 18, *Tex. Const.*[6] Indeed, Art. 2.04(2), *Tex. Elect.*

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6. In *Mauzy v. Legislative Redistricting Board,* 471 S.W.2d 570, 574, 575 (Tex. 1971), the Texas Supreme Court found that a state statute, which placed time limitations on every Texas political subdivision or agency (except the Legislature) so that they could not ". . . ever officially recognize or act upon any report or publication, in whatever form, of any Federal Decennial Census . . . before the first day of September of the year immediately following the calendar year during which such census was taken", *Vern. Ann. Civ. Stats.,* Art. 29d, is ineffective insofar as it conflicts with Sec. 28, Art. III of the Constitution. Art. III, § 28 vests the Legislative Redistricting Board with authority to redistrict the State if the Legislature fails to do so in the first regular session following the publication of the census. See also, *Smith v. Craddick,* 471 S.W.2d 375 (Tex. 1971),

Code, states that if there exists any election precinct that has been "split" between parts of "two or more . . . commissioners precincts" then the commissioners court should correct that division in the September term. Such a provision implies that election precincts may be "split" between two or more commissioners precincts incidental to the process of redistricting the commissioners precincts. However, should the commissioners court decide to redistrict election precincts, then Art. 2.04(1) requires that the commissioners do so in a July or August term.

Defendants look to *Wilson v. Weller*, 214 S.W.2d 473 (Tex. Civ. App. 1948, no writ hist.), to shun their obvious authority to redistrict their own commissioners precincts "from time to time, for the convenience of the people."[7] Ironically, *Wilson* involved another effort to redistrict Kleberg County—one sought by the commissioners themselves. By a single, unitary order entered on June 7, 1948, the court sought to change the boundaries of commissioners, justices of the peace, and voting precincts. A state district court injunction against the plan's implementation was affirmed by the intermediate appellate court on the ground that the effect to redistrict the voting precincts was void, since it was not accomplished in the July or August term of court. Therefore, since part of the comprehensive plan was invalid, the entire redistricting order was void, including the redistricting of commissioners precincts.

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where the Texas Supreme Court struck down a state reapportionment statute (No. 783, 62nd Leg. Reg. Sess. 1971) because it conflicted with Art. III, Sec. 26 of the Texas Constitution.

7. Defendants do not argue that they had no authority to redistrict, they simply argue their proposed plan was presented to the district court at an improper time of year under their reading of Art. 2.04(1), *Tex. Elect. Code* (Pet. Br. 16).

Although there are serious questions with regard to the validity of the *Wilson* decision as a matter of Texas law, e.g. conflict with *Williams v. Castleman, supra,* the case is simply inapplicable here. Unlike in 1948, the Kleberg County Commissioners Court this time has not purported to alter or change the boundaries of any election or voting precincts. The district court ordered the defendants to present a constitutionally-acceptable plan for reapportionment of the *commissioners* precincts, not the *election* precincts. The defendants responded by submitting a plan for redistricting *commissioners* precincts, not *election* precincts. The defendant County Judge testified, in fact, that the changes in commissioner precincts would not affect the voting precincts "insofar as an election is concerned" (J.A. 36), and that the election precincts were not reenumerated, but simply "split". (J.A. 48). There being no change in voting precinct boundaries, *Tex. Elect. Code,* Art. 2.04, and *Wilson v. Weller* are inapposite.

Furthermore, the election precincts that were split by commissioner precinct lines were split on the defendants' own volition. They were under no coercive order from the district court to do so, and instructions to their statistician to avoid electoral precinct splits would probably have been effective. Indeed, plaintiffs submitted a plan at the first trial on October 30, 1978, that did not require any splits or voting precinct changes. See plaintiffs' exhibits nos. 5 and 6. Defendants did not offer their expert that plan out of fear that he might be "polluted" by other plans. (J.A. 42).

Defendants next cite as instructive a footnote in *Morris v. Gressette, supra,* where this Court compared the legis-

lative plan in *Connor v. Waller,* 421 U.S. 656 (1975), with the court-ordered plan in *East Carroll.* (Pet. Br. 16, 17). The defendants fail to mention that *Morris* itself stands for the proposition that a plan submitted by the political subdivision pursuant to litigation does not lose its legislative status merely because it is submitted pursuant to court order and that it will not be effective as law until it has been precleared pursuant to Section 5.

In *Morris, supra,* South Carolina enacted a reapportionment statute for the State Senate. The State sent a notice to this effect to the Attorney General. Before the Attorney General could rule on the submission, plaintiffs filed a lawsuit based on the Fourteenth and Fifteenth Amendments, as well as Section 5. Shortly thereafter the Attorney General objected to the apportionment statute. The district court, aware of this Section 5 objection, refused to hear the plaintiffs' Section 5 complaint and chose instead to rule on the plaintiffs' Fourteenth and Fifteenth Amendment claims. The Court found that the South Carolina Senate reapportionment violated the one person, one vote principle but did not dilute minority voting rights and gave the state thirty days to submit a new apportionment plan. A new plan was submitted to the district court, as well as to the Attorney General for Section 5 preclearance. Before the Attorney General could rule on the plan, the district court found it to be constitutional. The Attorney General, relying on *Johnson,* decided not to pass judgment on the plan since that decision had already been made by the district court.

Plaintiffs filed an action in the District Court for the District of Columbia and secured an order requiring the Attorney General to rule on the plan. Pursuant to this interlocutory order the Attorney General interposed an

objection to the plan. The plaintiffs then filed a Section 5 enforcement action in the district court in South Carolina. That complaint was dismissed because of the failure of the Attorney General to rule within sixty days of the completion of the submission. Plaintiffs appealed, arguing that the interlocutory order of the District Court for the District of Columbia gave the Attorney General authority for his otherwise untimely objection.

The Supreme Court found that the order of the District Court for the District of Columbia was invalid because no judicial review was permitted of the Attorney General's Section 5 decision; consequently, the Attorney General's objection was more than sixty days late and, hence, had no force or effect under Section 5.

The instructive feature of *Morris* for purposes of the present litigation is the fact that the South Carolina plan had to be submitted to the Attorney General, even though it was prepared pursuant to a court order, and even though the district court in that case had found the plan to be constitutionally valid. As this Court said, "[S]ince that plan has not been declared by the District Court for the District of Columbia to be without racially discriminatory purpose or effect, it can be implemented only if the Attorney General 'has not interposed an objection' to the plan within the meaning of § 5 of the Voting Rights Act." *Ibid.* 482 U.S. at 499, 500; see also, *Ibid.* 432 U.S. at 499, note 12 (agreement of both parties that Section 5 is applicable).

Plaintiffs contend that *Morris* and *Board of Supervisors, Warren Co., Miss., post,* are controlling authority for the disposition in this case as well as this Court's holding in *Wise v. Lipscomb,* 437 U.S. 535 (1978).

In *Wise,* an action was brought by Black residents of Dallas, Texas, against the mayor of Dallas and members of the Dallas city council. The district court held that the at-large system of electing city council members, as mandated in the city charter, unconstitutionally diluted the voting strength of Black citizens. The court then afforded the city council an opportunity to prepare a constitutional reapportionment plan. Thereafter, the city council proposed to pass an ordinance that would provide for eight council members to be elected from single-member districts and for the remaining three members, including the mayor, to be elected at-large. The district court then approved the plan and the city council formally enacted the ordinance. Later the district court issued an opinion sustaining the council's plan as a valid legislative act. This was done despite the fact that state constitutional and statutory provisions required a referendum vote to amend the city charter. *Lipscomb v. Wise,* 399 F. Supp. 782, 789 (N.D. Tex. 1975).

The court of appeals reversed, holding that the district court had erred by evaluating the council's actions only under constitutional standards rather than also applying the principle that absent exceptional circumstances, "judicially-imposed" reapportionment plans should employ single-member districts. *Lipscomb v. Wise,* 551 F.2d 1043 (5th Cir. 1977).

The Supreme Court reversed and remanded. Although unable to agree on an opinion, six members of the Court agreed that the "eight/three" ordinance was a "legislative plan" to be judged under the relatively more lenient constitutional standards, which would permit the three multi-member districts adopted by the Dallas council.

Justice White announced the judgment of the Court, and in an opinion joined by Justice Stewart, expressed the view that when the district court invalidated the provisions of the Dallas city charter mandating at-large council elections, the City had the duty to devise a substitute plan rather than to leave the matter to the district court. The Court then observed that even though the council itself had no power to change the at-large system, as long as the city charter was declared unconstitutional, the council was free to exercise its inherent legislative powers by enacting an ordinance concerning the eight/three plan. Consequently, the Court found that the district court should consider the city council's substitute plan under the principles applicable to legislatively-adopted reapportionment plans rather than judicially-imposed plans and that the council's ordinance should not be subject to a level of scrutiny more stringent than that required by the Constitution.

Justice Powell, joined by the Chief Justice, and Justices Blackmun and Rehnquist, concurring in part and concurring in the judgment, agreed that the reapportionment plan adopted by the Dallas city council was a "legislative" plan for purposes of review by a federal court. They further expressed the view that the plan was "legislative" regardless of whether the council had the power under state law to reapportion itself, the essential point being that the city council had exercised a legislative judgment which reflected the policy choices of the elected representatives of the people rather than the directive of a federal court.

Justice Marshall, joined by Justices Brennan and Stevens, dissenting, expressed the view that since the

Dallas city council had no authority under state law to reapportion itself, the plan ordered by the district court should have been evaluated in accordance with the federal common law of remedies applicable to judicially devised reapportionment plans. Even if the plan were properly to be viewed as a "legislatively enacted" plan, it should not be approved, since the vice in the original apportionment system was the dilution of the voting power of a racial minority resulting from at-large voting, and thus it was inappropriate either for the local legislative body or a court to maintain the same system.

The facts described in the majority opinion in *Wise* parallel the facts in the instant case. First, when the district court found the 1968 Kleberg County apportionment plan unconstitutional, that court, citing *Wise,* deferred judicial imposition of a plan pending action by the legislative body to reapportion itself. (District Court's Memorandum and Order of October 2, 1979; Petition For Certiorari, Appendix p. A-19). The legislative body then responded to its duty and decided, when given the opportunity, to "redistrict ourselves". (J.A. 42). The commissioners court adopted a plan for presentation to the district court as the plan they officially wanted and would adopt, if permitted by the district court. (J.A. 40). The district court then "approved" the plan for the 1980 election. (District Court's Order of October 2, 1979; Petition for Certiorari, Appendix, p. A-19). Second, the defendants had the appropriate authority to redistrict the commissioners precincts at the time they submitted the plan to the court as previously discussed.

Since the dissenting members of the Court in *Wise* would not have dissented on the issue of "legislative" versus "court-ordered" plans had they believed that the

Dallas city council had valid legislative authority, it follows that the existence of such authority here unites the Court in support of the plaintiffs' contention that the plan of the Kleberg County Commissioners is a legislative plan,[8] that it did not lose its "legislative"

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8. Defendants argue that the Justices supporting this "legislative judgment" concept would find that defendants did not exercise the policy choices of elected representatives by having a college professor prepare a mathematical redistribution of Kleberg County according to the 1970 census. (Pet. Br. 18) This argument overlooks the fact that it was the defendants who decided to hire an expert (J.A. 24); it was the defendants who decided who that expert would be (J.A. 14, 24, 25); it was the defendants who instructed the expert in his drawing of the plan (J.A. 25, 28), indeed, the expert had no interest in the plan other than as instructed by the defendants; it was the defendants who modified Dr. Nash's plan (J.A. 28, 35); and, most important of all, it was the defendants who adopted the plan as the plan they would submit to the district court and enact if the court permitted them to do so (J.A. 40). Additionally, the apparent benign modification made by the defendants had the effect of taking a Justice of the Peace for county precinct four out of the courthouse and replacing him with a Justice of the Peace from precinct one. County precinct four has a 97.5% Mexican-American majority while county precinct one has a 59.7% Anglo majority according to the 1970 census (J.A. 77). The Justice of the Peace in the courthouse is, by practice, the magistrate who sets criminal bonds and handles other criminal matters, because the sheriff's office and jail is located in the courthouse. See *Tex. Code Crim. Pro.*, Art. 1703 (personal bonds), Art. 1705 (bail bonds), Art. 1517 and 1406 (informs accused of his rights), and Art. 1503 (issue warrants), see Art. 2.09 for definition of magistrate. Also, the Justice of the Peace in the courthouse has broader jurisdiction to hear civil cases than other Justices of the Peace, *Vern. Ann. Civ. Stats.*, Art. 2390. Clearly this modification was a policy decision affecting the community. This is not the first time citizens residing in precinct four have been adversely affected by the decisions of the Anglo dominated commissioners court. At the trial of this case on October 30, 31, 1978, the Plaintiffs introduced into evidence the Kleberg County audit reports from 1968-1977 (plaintiffs' exhibits 36-50). The major expenditures by the County over this ten year period revealed that the County only spent $1,670.84 in precinct four out of a $2,779,536.54 ten year budget for major expenditures. (See, cumulative chart of major expenditures of Kleberg County, 1968-1977, plaintiffs' exhibit 73).

status merely because it was submitted in response to a court order, and that it should not be considered effective as law "until it has been submitted and has received clearance under Section 5."

Other recent decisions of this Court compel the conclusion that the Kleberg County plan is a creature of the exercise of the legislative will of the defendants, and therefore subject to Section 5 review. *Burns v. Richardson,* 384 U.S. 73 (1966); *U.S. v. Board of Supervisors, Warren County, Miss.,* 429 U.S. 642 (1977); and *Connor v. Waller,* 421 U.S. 656 (1975).

In *Burns, supra,* a three-judge district court declared Hawaii's senate apportionment scheme unconstittuional under the principles announced in *Reynolds v. Sims,* 377 U.S. 533 (1964). The district court later directed the Hawaii Legislature to present it with an interim plan pending future action by the Legislature to amend its constitution to provide for the reapportionment of senate seats. The Legislature enacted such an interim plan, even though the Legislature did not have the power under the state constitution to reapportion the senate seats without a constitutional amendment. *Ibid.* 377 U.S. at 78, n. 5. The district court disapproved of the interim plan, finding it objectionable, in part, because it used multi-member districts. The Supreme Court reversed, in part on the ground that the interim proposal was a "legislative" plan that would be set aside only on a showing of purposeful discrimination against an identifiable element of the population. 384 U.S. at 89. Hence, this Court acknowledged that the absence of authority to redistrict under state law does not automatically convert the otherwise "legislative" action into a judicially-imposed apportionment plan.

In *U.S. v. Board of Supervisors, Warren Co., Miss.*, 429 U.S. 642 (1977), the Board redistricted in 1970 pursuant to a plan to which the Attorney General had interposed a Section 5 objection. The County Board held elections pursuant to the 1970 plan. Thereafter, the Attorney General filed a Section 5 complaint in the District Court for the Southern District of Mississippi alleging that his objection to the 1970 redistricting plan rendered it unenforceable under Section 5, and that the pre-1970 election districts were malapportioned under the Fourteenth Amendment. The Attorney General sought (1) a declaration that implementing the 1970 plan violated Section 5, (2) an injunction against implementing the 1970 plan or any other new plan until there was compliance with Section 5, and (3) an order that a new plan be developed and implemented after being found acceptable under the Act. The three-judge district court entered summary judgment for the Attorney General and decided that the 1970 plan was unconstitutional on Fourteenth and Fifteenth Amendment grounds. The court then directed that the parties attempt to agree on a new plan. When the parties could not agree on a new plan the court adopted a plan prepared by the county, even though the plan had not been approved under Section 5.

On direct appeal, the Supreme Court reversed and remanded. In a *per curiam* opinion, expressing the unanimous view of the Court, it was held that in a "coverage" action brought in a local three-judge district court the inquiry is limited to whether the change was subject to federal approval under Section 5, and the district court should not consider whether the change discriminated on account of race, since substantive discrimination issues are reserved by the Act for consideration by

the District Court for the District of Columbia or the Attorney General. Of particular significance in *Board of Supervisors, Warren Co., Miss.* is this Court's statement that "[I]n both instances the court below erred in deciding the questions of constitutional law; it should have determined only whether Warren County could be enjoined from holding elections under a new redistricting plan because such plan had not been precleared under § 5." *Ibid.* 429 U.S. at 647.

As in *Board of Supervisors, Warren Co., Miss.*, the court below, after finding a Fourteenth Amendment violation, ordered the legislative body to produce a constitutionally acceptable plan, and in both cases the political subdivision's plan was considered legislative in character even if it had been submitted in response to a court order. Section 5 preclearance was required by the Fifth Circuit regardless of a finding of constitutionality by the district court, consistent with this Court's decision in *Board of Supervisors, Warren Co., Miss.* The instant case differs from *Board of Supervisors, Warren Co., Miss.* only by the fact that the Board's second plan was opposed by the Attorney General under Section 5.

One final case that supports the defendants' position is *Connor v. Waller, supra.*[9] In *Waller*, the court-formulated,

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9. Defendants in their brief concede that the apportionment plan in *Waller* required Section 5 preclearance. They argue that the Legislature acted independently of the court proceeding and the plan was adopted "in the course of litigation" only in the sense of contemporaneousness. (Pet. Br. 17). This alleged independence of the Legislature from the concerns of the litigation is not supported by the district court record which describes the hearing below on the constitutionality of the 1973 plan saying that several of the legislators attended and "[I]mmediately after the hearing . . . it became public knowledge that the Legislature had initiated another effort to re-

multi-member plan originally adopted in *Johnson, supra,* was still in effect, despite the Supreme Court's instruction in *Johnson* that, on remand, single-member districts for Hinds County should be used if at all possible; and despite instruction from the Supreme Court in *Connor v. Williams,* 404 U.S. 549 (1972), that a special master be appointed to draw single-member districts for Hinds County to replace the *Johnson* court-formulated plan. Under this pressure and in response to this Court's policy of legislative deferment announced in *Chapman v. Meier,* 420 U.S. 1 (1975), the Mississippi Legislature enacted a state reapportionment statute. *Connor v. Waller,* 396 F. Supp. 1308, 1310, 1311 (S.D. Miss. 1975). The three-judge district court in *Waller* found that apportionment statute to be constitutional and not subject to Section 5 preclearance requirements under *Johnson.*

On appeal to the Supreme Court, the three-judge district court was reversed in a *per curiam* order expressing the unanimous view of the eight participating members of the Court. This Court stated that the Mississippi apportionment statutes ". . . are not now and will not be effective as law until and unless cleared pursuant to Section 5. The district court accordingly erred in deciding the constitutional challenges to the Acts based upon claims of racial discrimination." *Waller,* 421 U.S. at 656. Similarly, the Court in the instant case should find that the plan is a legislative plan whose constitutionality should not have been judged by the district court until the defendants had complied with the Section 5 preclearance procedure, *Waller, supra; Board of Supervisors, Warren Co., Miss., supra; Morris, supra.*

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apportion its membership." *Waller,* 393 F. Supp. 1308, 1310, 1311 (S.D. Miss. 1975).

2. PRECEDENT ASIDE, THE LEGISLATIVE HISTORY AND PURPOSE OF THE VOTING RIGHTS ACT REQUIRE SECTION 5 PRECLEARANCE IN THE INSTANT CASE

A. History And Purpose Of The Voting Rights Act

The Voting Rights Act of 1965 grew out of a long history of resistance to the Fifteenth Amendment's proscription of racial discrimination in voting. That history, which was reviewed by the Supreme Court in the course of upholding the Act's constitutionality in *South Carolina v. Katzenbach,* 383 U.S. 301, 308-315 (1966), showed a persistent and often ingenious use of tests and devices to disenfranchise Black citizens.[10] Congress, in response, banned or restricted the use of many of these discriminatory devices.[11] Additionally, Congress recognized ". . . that some of the States covered by Section 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination . . . (and) that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *Ibid.* 383 U.S. at 335. To foreclose these anticipated evasive maneuvers, Congress enacted the broad prophylactic rule of Section 5 of the Act, which prohibits covered states which "enact or seek to administer" any new "voting qualification or prerequisite to voting, or standard, practice or procedure with

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10. H. R. Rep. No. 437, 89th Cong. 1st Sess. 8-13 (1965); S. Rep. No. 162, Pt. 3, 89th Cong. 1st Sess., 3-12 (1965).

11. These devices include literacy tests, requirements of "good moral character", and voucher requirements, §§ 4(a)-(b), 42 U.S.C. §§ 1973b(a)-(d), as well as poll taxes, § 10, 42 U.S.C. § 1973h.

respect to voting" from doing so without first securing the approval of either the Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. § 1973c. In an effort to avoid the delays and uncertainties fostered by prior statutes, under which affected parties or the Attorney General had been forced to assume the initiative in challenging discriminatory voting practices, Congress placed the burden of proof in Section 5 proceedings squarely upon the acting state or municipality to show that its proposed change is free of a racially discriminatory purpose or effect. In short, Congress, through the Voting Rights Act of 1965, imposed a stringent and comprehensive set of controls upon states falling within the Act's coverage.

In considering the 1975 extension of the Act, Congress gave careful consideration to the propriety of readopting Section 5's preclearance requirement. After determining that Section 5 should be extended for another ten years, Congress gave that provision this strong endorsement:

> . . . The Committee is convinced that it is largely Section 5 which has contributed to the gains thus far achieved in minority political participation. Moreover, it is Section 5 which serves to insure that this progress shall not be destroyed through new procedures and techniques. Now is not the time to jeopardize this progress through the removal of these crucial preclearance protections.

S. Rep. No. 94-295, 94th Cong., 1st Sess., 19 (1975).

In making its decision to extend for another ten years the Voting Rights Act, the Committee was aware of the significant role Section 5 would play after the publication

of the 1980 census.[12] The legislative history of the 1975 extension specifically expresses the intent of Congress that Section 5 apply to all voting changes[13] including reapportionment plans adopted in the course of litigation.[14] The report of the Senate Committee which considered the extension stated that Section 5 is intended to establish, ". . . a form of primary jurisdiction for Section 5 review under which courts dealing with voting discrimination issues should defer in the first instance to the Attorney General or to the District of Columbia

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12. Commenting on the role of Section 5 in the upcoming 1980 reapportionment cases, the Senate Committee said: "[I]t is ironic that the Supreme Court's one-man, one-vote ruling [*Reynolds v. Sims*, 377 U.S. 533 (1964)] has created opportunities to disenfranchise minority voters. Having to redraft district lines in compliance with that ruling, jurisdictions may not always take care to avoid discrimination against minority voters in that process. By providing that Section 5 protections not be removed before 1985, S. 1279 would guarantee Federal protection of minority voting rights during the years that the post-census redistricting will take place." S. Rep. 94-295, 94th Cong., 1st Sess., 18 (1975).

13. See, *Dougherty County, Ga., Board of Education v. White*, 439 U.S. 32 (1978), where this Court found that ". . . both the House and Senate Judiciary Committees, in recommending extension of the Act, noted with approval the 'broad interpretations of the scope of Section 5' in *Allen* and *Perkins v. Matthews*. S. Rep. No. 94-295, p. 16 (1975); H.R. Rep. No. 94-196, p. 9 (1975). Confirming the view of this Court, the Committee Reports stated, without qualification, that '[S]ection 5 of the Act requires review of *all* voting changes prior to implementation by the covered jurisdictions.' S. Rep. 15; H.R. Rep. 8 (emphasis added)." 439 U.S. at 39.

14. Congress has endorsed only one exemption to Section 5 coverage in the field of reapportionment resulting from litigation and that was this Court's holding in *Johnson, supra*. "The one exception where Section 5 review would not ordinarily be available is where the Court, because of exigent circumstances, actually fashions the plan itself instead of relying on a plan presented by a litigant. This is the limited meaning of the "court decree" exception recognized in *Connor v. Johnson*, 402 U.S. 590 (1971)." S. Rep. No. 94-295, 94th Cong., 1st Sess., 19 (1975).

District Court." S. Rep. No. 94-295, 94th Congress, 1st Sess., 18 (1975). The Senate Committee further spoke directly to the issue of the application of the Voting Rights Act to the instant case saying:

> Thus, for example, where a federal district court holds unconstitutional an apportionment plan which predates the effective date of a coverage under the Voting Rights Act, any subsequent plan ordinarily would be subject to Section 5 review. In the typical case, the court either will direct the governmental body to adopt a new plan and present it to the court for consideration or else itself choose a plan from among those presented by various parties to the litigation. In either situation, the court should defer its consideration of—or selection among—any plans presented to it until such time as these plans have been submitted for Section 5 review. Only after such review should the district court proceed to any remaining Fourteenth or Fifteenth Amendment questions that may be raised.

S. Rep. No. 94-295, 94th Cong., 1st Sess., 18, 19 (1975).

While the Senate expressed its will that Section 5 apply to a reapportionment plan such as presented in these circumstances,[15] no changes in the language of Section 5 were considered necessary to accomplish that

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15. The Senate Committee cited *Gaillard v. Young*, (Civil No. 74-1265 D. S. Car. 1975), as a correct example of the application of Section 5. In *Gaillard*, the district court waited until the Attorney General had approved the submitted plan, before the court ordered it implemented. S. Rep. 94-295, 94th Cong., 1st Sess., 19 (1975). Defendants concede that the facts of the instant case are "identical to those in this case (*Gaillard*)" (Pet. Br. 25). Plaintiffs interpret this concession of the defendants to mean that they agree that the legislative history required Section 5 preclearance in this case.

result.[16] The Congressional intent to require preclearance prior to court approval of an apportionment plan for Kleberg County is manifest.

B. Operation Of The Voting Rights Act To The Instant Case

Under the operation of the Act, once a determination is made that the state or political subdivision is covered by the Act, a series of "coverage" questions are immediately presented. It is well settled law that Texas is a covered jurisdiction under the Voting Rights Act. *Briscoe v. Bell,* 432 U.S. 404 (1977).

The first coverage inquiry is whether the political subdivision "shall enact or seek to administer" a voting "standard, practice, or procedure". 42 U.S.C. § 1973c. In the instant case the defendants adopted a plan for submission to the district court as the plan the defendants would adopt if permitted to do so by the court (J.A. 40). This act of submitting the plan and informing the court that the defendants desired to implement the plan if permitted to do so by the court, is tantamount to enactment under the circumstances; and, at the very minimum, it qualifies as "seeking to administer" the plan by proposing that it be incorporated into the court's decree.[17] Hence,

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16. This Court has stated that "subsequent legislation declaring the intent of an earlier statute is entitled to significant weight" in statutory construction. *National Labor Relations Board v. Bell Aerospace Co.,* 416 U.S. 267, 275 (1975); *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367, 380-381 (1969). Such consideration is especially appropriate where, as here, the Congressional intent is expressed in legislation extending, without change, the earlier statutory provision, which was enacted only five years earlier.

17. A finding that the defendants' action of submitting the plan to the district court is encompassed in the phrase "enact or seek to

the first coverage inquiry for the instant case has been answered in the affirmative.[18]

The second coverage inquiry is whether the political subdivision is proposing a voting "standard, practice or procedure". 42 U.S.C. § 1973c. The instant reapportionment plan falls under this language. *Georgia v. U.S.*, 411 U.S. 526 (1973); *Waller, supra; Morris, supra; Board of Supervisors of Warren County, Miss., supra;* and *Wise, supra.*

The third coverage inquiry is whether the proposed voting change was "different from that in force or effect on November 1, 1972." 42 U.S.C. § 1973c. Since the present apportionment plan was created in 1979, the third coverage inquiry is answered in the affirmative.

The fourth and final coverage question is whether the proposed voting change has been found by the United States District Court for the District of Columbia not to "have the effect of denying or abridging the right to vote on account of race or color" or whether the political subdivision has submitted the proposed voting change to the Attorney General "and the Attorney General has not interposed an objection within sixty days after such sub-

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administer" would be consistent with the legislative history of the 1975 extension which ". . . leaves no doubt but that Congress intended all electoral changes by political entities in covered jurisdictions to trigger federal scrutiny." *Dougherty Co., supra,* 439 U.S. at 46.

18. The only exception to these Section 5 coverage standards is stated in *Johnson, supra,* where the voting change or plan originates with the court itself and is embodied in the court's decree. The court-formulated reapportionment plan which the Supreme Court reviewed in *Johnson* was not subject to Section 5 because the covered jurisdiction did not "enact or seek to administer" it within the plain meaning of the Act.

mission." 42 U.S.C. § 1973c. Neither of these conditions have been satisfied by the defendants; therefore, Section 5 preclearance is required.

The operation of Section 5 in a reapportionment case requires the jurisdiction, in fulfillment of its legislative duty to submit a substitute plan, to obtain preclearance of its plan prior to submission to the reapportionment court for approval. This preclearance duty runs with the legislative body and not the judiciary. A legislative body cannot present the court with a valid legislative plan until it has met its responsibilities under Section 5. The role of the judiciary is simply to ensure that the legislative plan is a "valid legislative response." *Wise, supra,* 427 U.S. at 544. The constitutional validity of a plan cannot be reviewed by the district court "until clearance has been obtained." *Ibid.* 437 U.S. at 542; *Morris supra; Board of Supervisors, Warren Co., Miss., supra.*

C. Policy Arguments For The Application Of Section 5 Preclearance To The Instant Case

Defendants argue that Section 5 contemplates only voluntary departures from an existing apportionment plan and that otherwise, the voters are effectively disenfranchised pending the acceptance of a new plan and elected officials under the old apportionment plan could cause indefinite delays in an attempt to stay in office. (Pet. Br. 12)

Even without the advent of the Voting Rights Act there were judicial findings of unconstitutionality of apportionment plans to which the defendants' worst case delay scenario could apply. However, in the past, as in the present with the Voting Rights Act, the federal

judiciary has the power to order interim relief pending appropriate legislative action. *Burns, supra; Chapman, supra;* and *Johnson, supra.* Section 5 does not remove this power from the federal court. In the event that officials, elected under an invalidated plan, purposely delay implementation of a new plan, the court could order interim relief, which may include the adoption of plans submitted by the parties, including the plaintiffs. This factor alone would prompt most officials, no matter how recalcitrant, not to delay and thereby foreclose their opportunity to affect the resulting apportionment plan.

The defendants' argument that the Act is directed only toward voluntary changes and not court-precipated changes is simply not supported by legislative history.[19] Had Congress intended the Act to apply as defendants suggest, then surely there would be some expression made of this intention during the extension hearings in 1970 and 1975. Indeed, it would be anomalous to impose the special protecion of Section 5 on those jurisdictions which, on their own initiative, adopt reapportionment plans in an effort to meet constitutional standards, while exempting those which reapportion only in response to judicial intervention. Such an interpretation of Section 5 might have the consequence of encouraging covered jurisdictions to be derelict in reapportioning or correcting Fourteenth or Fifteenth Amendment violations in their

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19. See, S. Rep. No. 94-295, 94th Cong., 1st Sess. (1975); see also, *U.S. v. Board of Commissioners of Sheffield, Ala.*, 435 U.S. 110 (1978), where this Court said, "[W]hatever one might think of the other arguments advanced, the legislative background of the 1975 re-enactment is conclusive of the question before us. When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby." 435 U.S. at 134.

apportionment plans. If a covered jurisdiction were confronted with the choice of either acting to adopt a plan which corrects constitutional infirmities, subject to Section 5's special burden of proof, or not acting until ordered to do so by the court in the context of a privately initiated lawsuit, thus permitting the covered jurisdiction to avoid the responsibility of Section 5 submission, the jurisdiction might well choose the latter course. The result of the defendants' argument that Section 5 should apply only to voluntary changes by political subdivisions would be to nullify Section 5 by creating an avenue for the most resistant political subdivisions to circumvent the Act.

Defendants further suggest that Section 5 was designed to provide federal scrutiny of new voting procedures, and since the district court in the instant case found their plan constitutional, no further benefit could be derived by having Section 5 preclearance.[20] (Pet. Br. 13) That argument overlooks the purpose of the Act ". . . to banish the blight of racial discrimination in voting which has infected the electoral process in parts of our country for nearly a century", *South Carolina,* 383 U.S. at 308. Congress chose to accomplish this purpose through a ". . . complex scheme of stringent remedies aimed at areas where voting discrimination has been the most flagrant," *Ibid.* 383 U.S. at 315; because experience had shown such remedies to be necessary to eradicate the ". . . insidious and pervasive evil of (racial discrimination in voting) that had been perpetuated in certain parts of the country." *Ibid.* 38 U.S. at 309. To prevent any future

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20. Defendants' position is in direct opposition to this Court's ruling in *U.S. v. Board of Supervisors, Warren County, Miss., supra; Morris, supra; City of Rome v. U.S.,* ____U.S.____, 64 L.Ed. 2d 119, 100 S.Ct. ____ (1980).

circumvention of constitutional policy, Congress adopted Section 5, which provides that whenever a designated state or political subdivision wishes to change its voting laws, it must first demonstrate to a federal instrumentality that the change will be nondiscriminatory. "By freezing each covered jurisdiction's election procedures, Congress shifted the advantages of time and inertia from the perpetrators of the evil to its victims". *United States v. Board of Commissioners of Sheffield, Ala.*, 435 U.S. 110, 121 (1978). This is accomplished under the Act by the Section 5 preclearance procedure which switches the burden to the state or political subdivision to prove that its proposed change does not have the potential of discriminatory *effect* based on race, rather than placing the burden on the plaintiffs to prove that the proposed change has a discriminatory *purpose* in a suit brought under the Fourteenth and Fifteenth Amendments.

To adopt the defendants' argument that the local district court supplied sufficient "federal presence" and that Section 5 is not needed in the instant case, would be to place the advantage of time and inertia back on the perpetrators of the discrimination, and, equally seriously, it would invite states to circumvent changes through litigation. Defendants would have minority group members seek recourse from pernicious voting law changes in the one remedy Congress ". . . implicitly found to be unsatisfactory: repeated litigation." *Board of Commissioners of Sheffield, Ala.*, 435 U.S. at 125. Defendants not only ignore the express Congressional intent underlying the Act, but also ignore the decisions of this Court requiring Section 5 preclearance regardless of a previous finding of constitutionality by local district court. *Board*

of Supervisors, Warren County, Miss., supra; Morris, supra; City of Rome, supra.

Defendants' "federal presence" argument also overlooks the special role that the Attorney General and the District Court in the District of Columbia play in Section 5. Because of the creative genius which covered states and their political subdivisions used to frustrate federal court decrees, prior to the Voting Rights Act, Congress believed it necessary to have new voting changes examined by eyes that were experienced in the detection of sophisticated, racially discriminatory schemes and devices.

Congress vested primary jurisdiction to review new voting changes in the District Court for the District of Columbia and the Attorney General. They are the Congressionally selected federal experts who have exclusive jurisdiction to review these changes. Since the enactment of the Voting Rights Act, the Attorney General and the District Court for the District of Columbia have developed an expertise in this area that local district courts cannot parallel despite their utmost diligence. The express language of the Voting Rights Act would have to be violated, and clear Congressional intent ignored, if the defendants' "federal presence" argument is to be taken seriously. As the Senate Committee said in the 1975 extension hearings, "[N]ow is not the time to jeopardize this progress through the removal of those crucial preclearance protections." S. Rep. 94-295, 94th Cong., 1st Sess., 19 (1975).

Other policy considerations favor a finding that the Kleberg County plan is a "legislative" rather than "court-ordered" plan subject to Section 5 preclearance. "Redistricting and reapportionment is a legislative task which federal courts should make every effort not to pre-empt."

Wise, supra, 437 U.S. at 539; *Burns, supra;* and *Chapman, supra.* If the Court should decide to follow *East Carroll* and find that any gap in authority to make changes under state law, no matter how small, automatically makes a plan "court-ordered", then not only will the federal judiciary become more deeply involved in reapportionment, but also the legislative bodies will be required to surrender more of their rights to make policy decisions on behalf of their electorate. Since "court-ordered" plans are put to a more stringent standard of review than legislative plans, *Wise,* 437 U.S. at 541, reapportionment plans presented by legislative bodies that would otherwise pass constitutional muster will now fail. This result is readily apparent in the context of one-person, one-vote cases.

Legislatively devised plans that are categorized as "court-ordered" because of a technical restriction of state authority, may be found violative of the higher judicial standard of de minimus variation. Once a plan is found in violation, not only will the judiciary become more involved in drawing new apportionment plans, but important public policy objectives incorporated in the legislative plan will be compromised, *White v. Weiser,* 412 U.S. 783, 795 (1973). Additionally, this heightened judicial involvement will result in the unnecessary consumption of judicial resources, while increasing the number of election postponements and delays.

Another reason why this Court should not let Section 5 coverage turn on the issue of whether or not there is an imperfection of state authority is that such an exception could readily be manipulated by political subdivisions to circumvent coverage under the Act. In Texas, alone,

there are many ways a political subdivision could draft a reapportionment plan in violation of state law[21] in order to ". . . achieve . . . what it could not do itself without preclearance."[22] This prospect is especially alarming since Texas leads all other states in the number

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21. Any of the following restrictions of the Texas Election Code could be used in a political subdivision's plan in order to circumvent Section 5. Art. 2.04(1), Texas Election Code prohibits redistricting of election precincts other than during a July or August term of the Commissioners Court. Art. 2.04(2) prohibits formation of an election precinct out of two or more justice precincts, commissioners precincts, state senatorial districts, state representative districts, or congressional districts. No election precinct shall have less than 100, nor more than 2,000 voters; however, counties with a population less than 100,000 may establish election precincts of not less than 50 voters, and counties with a population less than 50,000 may establish precincts of less than 50 voters upon the petition of 25 or more registered voters within the county. There shall be a minimum of one election precinct wholly contained with each commissioner precinct. Art. 2.04(3) requires each ward to constitute an election precinct population of at least 10,000 unless the ward contains more than 2,000 voters. In case of the latter, the county is restricted from making a precinct out of parts of two wards; and no precinct shall include territory outside the corporate limits of the city or town unless the Commissioners Court finds that adjacent unincorporated territory is so situated that it cannot be formed into or included within an election precinct wholly outside the city, of suitable size and shape, and containing a suitable number of voters. Art. 2.04(5) limits the operative date of any of the aforementioned election precinct changes until the beginning of the following voting year. Art. 2.04(6) lists requirements for notice of intent to effect changes in counties with a population of 500,000 or more. If these notice requirements are not met, the precinct boundary changes will be nullified. Art. 2.05 permits a governing body of a municipality to combine two or more county election precincts into one municipal precinct, but the governing body is restricted from including parts of one county precinct into two municipal precincts. See also, Art. 5, § 18, *Tex. Const.* prohibits dividing a county into less than four commissioners precincts or more than eight commissioners precincts.

22. *U.S. v. Board of Commissioners, Sheffield, Ala.* 435 U.S. 110, 139 (1978) (Justice Powell, concurring in judgment).

of submissions made to the Attorney General,[23] and, since the total number of objections interposed to submissions from Texas ". . . almost exceeds the total number of objections sustained by any single state from the period of 1965-1978 . . ."[24]

Legislative authority of the political subdivision should not become a factor in deciding whether or not a plan is "legislative" or "court-ordered" for the purpose of Section 5 preclearance. When a political subdivision proposes a plan to the court, that act alone should trigger Section 5 coverage because the political subdivision is seeking to administer a voting change by having the court incorporate the subdivision's plan in its order. *East Carroll* should be read as turning on its own peculiar facts and this Court should adhere to its decision in *U.S. v. Board of Supervisors, Warren County, Miss., supra.* To rule otherwise would be contrary to the legislative history of the Voting Rights Act and would permit a judicially created exception to become a vehicle for the circumvention of the Act. Other undesirable results that would be caused by the adoption of such an exception to the Voting Rights Act would include: increased litigation and exhaustion of judicial resources, the compromise of state legislative policy choices when state plans fail to meet the higher standards of review for judicial plans, and the entanglement of the federal judiciary in the process of state reapportionment.

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23. Texas Advisory Committee to the U.S. Commission On Civil Rights, *A Report On The Participation Of Mexican-Americans, Blacks and Females In The Political Institutions And Processes In Texas,* 1968-1978, Vol. 1, 153 (1980).

24. *Ibid.* at 163.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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